

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 7TH FEBRUARY 2007 / 18TH MAGHA 1928

SA.No. 60 of 1993(F)

AS.115/1990 of DISTRICT COURT, THRISSUR -O.D.2148/1986 OF MUNSIF COURT,
THRISSUR
.....

APPELLANT/ RESPONDENT/PLAINTIFF:

MALABAR FINANCING COMPANY PRIVATE LTD.,
KECHERI, REPRESENTED BY ITS MANAGING
DIRECTOR.

BY ADV. SRI.N.P.SAMUEL,M.R.RAMACHANDRAN
M.R.RAMACHANDRAN

RESPONDENT/APPELLANT/DEFENDANT:

VASU, S/O. KUNNATHULLY LATE APPUTTY,
EDAKKALATHOOR VILLAGE AND DESOM,
THRISSUR TALUK, THRISSUR.

BY ADV. SRI.SIBY MATHEW
C.V.FRANCIS.

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 7/02 /07, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

M.SASIDHARAN NAMBIAR, J .

S.A.NO.60 OF 1993

DATED THIS THE 7th DAY OF FEBRUARY, 2007

JUDGMENT

Plaintiff in O.S.2148/86 on the file of Munsiff Court, Thrissur is appellant. Respondent is the defendant. The suit was filed for realisation of Rs.9,759/- being the balance amount due to appellant in respect of a kuri conducted by appellant from its Bangalore branch and prized by respondent and due under Ext.A1 bond. According to appellant though under Ext.A1 bond respondent agreed to pay future instalments at the rate of Rs.250/-, he defaulted to pay 39 instalments. The said amount is claimed with interest at 12% per annum. Respondent contended that appellant has no valid licence to conduct the kuri and the kuri was conducted at Kecheri and not at Bangalore and though he executed several documents, he did not receive prized money and therefore appellant is not entitled to the decree sought for.

2. Learned Munsiff on the evidence of PW1 and Dws 1 and 2 and Exts.A1 to A7 held that appellant conducted the kuri at Bangalore branch and respondent was a subscriber of the kuri and he prized the chitty and executed Ext.A1 bond and defaulted to pay the future

instalments and therefore appellant is entitled to the decree for realisation of the amount claimed in the plaint. Suit was decreed as prayed for. Respondent challenged the decree and judgment before District Court, Thrissur. Learned District Judge on re-appreciation of evidence held that the chitty was conducted in violation of the Kerala Chitties Act and though Ext.A1 was executed within the jurisdiction of the trial Court, the law applicable is that prevailing in Kerala and as the chitty was conducted in violation of the Chitties Act, appellant is not entitled to claim any amount. Following the decision of this Court in **Madhavan Nair Vs. Kunchu Nair (1959 KLT 43)**, it was held that appellant is not entitled to the decree sought for. Appeal was allowed and the suit was dismissed. This second appeal is filed challenging the dismissal of the suit and allowing the appeal.

3. Following substantial questions of law were formulated at the time of admission:

“(a) Is Section 3 of the Kerala Chitties Act applicable to kuries started outside Kerala State?

(b) When contravention of Section 3(1) of the Kerala Chitties Act is made punishable under Section 3(6) of the said Act, can a prized subscriber get out of his liability to pay the debt on the sole ground that the chit was conducted in violation of

Section 3(1) of the Act?

© When Ext.A1 creates a charge on immovable property for ensuring payment of debt, can a suit for enforcing the charge be filed anywhere else except in the place where the property is situate as per Section 16(c) of the Code of Civil Procedure?

(d) When the debt to the foreman arose by receiving the prized amount and executing Ext.A1 both of which took place in the registered office of the company in Kerala, is there any prohibition for filing a suit for recovery of the debt in Kerala?

(e) Cannot a suit lie under Section 20(a) of the Code of Civil Procedure where the defendant resides?

(f) Can the decision reported in 1959 KLT 43 be considered good law in view of the Full Bench decision reported in 1974 KLT 806, AIR 1987 SC 1257 and 1990(1) KLT 866?"

4. Learned Counsel appearing for appellant and respondent were heard.

5. The chitty was admittedly not conducted as provided under the provisions of Kerala Chitties Act. It was conducted outside the State of Kerala, in Bangalore. When the chitty is conducted in

Bangalore, provisions of Kerala Chitties Act cannot be applicable. Hence the transaction is covered by agreement between parties. Therefore the finding of learned District Judge that the chitty cannot be recognised and appellant is not entitled to claim any amount due under a chitty conducted in violation of the Chitties Act is not sustainable.

6. Learned District Judge interfered with the decision of learned Munsiff relying on the decision of this Court in **Madhavan Nair Vs. Kunchu Nair (1959 KLT 43)**. Learned District Judge did not notice the subsequent Full Bench decision of this Court in **P.K. Achuthan Vs. State Bank of Travancore, Calicut (1974 KLT 806)** as well as the decision of the Apex Court in **K.P. Subbarama Sastri and others Vs. K.S. Raghavan and others (AIR 1987 SC 1257)**.

7. A Division Bench of this Court in **K.S.Raghavan Vs. Subbarama Sastrigal (1971 KLT 231)** construing a chitty varyola held that the provision for payment of the entire amount due on failure to pay one or more instalments is unconscionable. This was considered by the Full Bench in **P.K.Achuthan Vs. State Bank of Travancore (1974 KLT 806)**. What actually transpires when a prized subscriber is allowed to draw the kuri amount, is grant of a loan was considered by the Full Bench and held:

“From what has been said above it is

manifest that what actually transpires when a prized subscriber is allowed to draw the kuri amount is the grant of a loan to him from the common fund in the hands of the foreman with the concessional facility of effecting the repayment in instalments subject to a stipulation that the said concession is liable to be withdrawn in the event of default being committed in payment of any of the instalments. Thus, it is really a debt in praesenti but permitted to be paid by instalments, the benefit of the said facility being available to the debtor only so long as the instalments are regularly paid. Such being the true nature of the transaction it is evident that on a correct application of the test laid down by the House of Lords in *John Wallingford's case*, Law Reports V Appeal Cases 685, the stipulation contained in the kuri security bond entitling the foreman to recover from the prized subscriber the whole of the balance amount due from him in a lump sum on his committing default in payment of any of the instalments cannot be regarded as a penalty clause. In this context it is necessary to remember that in the case of a stake-holder

(foreman) of a chit his relation to the subscribers is of such a special nature that special necessity exists justifying stringent provisions being incorporated in the agreement for the protection of his interest. Without punctual payments by the individual subscribers the foreman will not be in a position to discharge his obligations to those who prize the kuri from time to time and hence it is necessary that he should reserve to himself powers to enforce such payments. It is in furtherance of this objective of ensuring prompt payments that the stipulation is incorporated in the bond empowering the foreman to recover in a lump sum the entirety of the balance amount due in respect of the future instalments on default being committed by a prized subscriber in prompt payment of any of the instalments. We are clearly of opinion that in the context of the special features and incidents of the chit fund transactions such a stipulation in a kuri vari or chitty hypothecation bond cannot be regarded as unconscionable or penal."

The Full Bench decision was affirmed by the Apex Court in **K.P. Subbarama Sastri's** case (Supra). Their Lordships quoting the Full Bench decision held:

“Where a contract provides for payment of money in instalments and contains also a stipulation that on default being committed in paying any of the instalments the whole sum shall become payable at once, the true test for determining whether the said condition is in the nature of a penalty is to find out whether the amounts referred to in the agreement were debitum in praesenti although solvendum in futuro or whether they were to become due to the promisee only on the respective dates when the instalments were payable. If on a proper construction of a contract it is found that the real agreement between the parties was to the effect that the whole amount was on the date of the bond a debt due but the creditor for the convenience of the debtor allowed it to be paid by instalments intimating that if default should be made in the payment of any instalment he would withdraw the concession, then the stipulation as to the whole amount of the balance becoming payable

would not be penal; if, on the other hand, on a proper consideration of the terms of the contract the court comes to the conclusion that the debt itself arises or becomes due and payable by the debtor only on the respective dates fixed for the instalments the stipulation that on default being made in the payment of any instalment the whole of the balance should become due and payable would be in the nature of a penalty”

8. In view of the law settled by the Full Bench and affirmed by the Apex Court, the judgment of learned District Judge is unsustainable. The appellant is entitled to realise Rs.9,750/- with interest by sale of the plaint schedule property as found by learned Munsiff. Then the only question is what is the interest payable? Appellant is entitled to get interest at 12% till the date of the decree and thereafter at 6% per annum till realisation.

Second Appeal is allowed. The decree and judgment of the first appellate Court in A.S.115/90 are set aside. The decree and judgment of the trial Court in O.S.2148/86 is restored with the modification that future interest from the date of the decree is 6% per annum till realisation.

M.SASIDHARAN NAMBIAR, JUDGE

Acd

